IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1660

TERRELL DON HUTTO, et al.,
Petitioners,
v.
ROBERT FINNEY, et al.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE* *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership

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* The parties' letters of consent to the filing of this brief are being filed with the Clerk pursuant to Rule 42(2).

today includes two former Attorneys General, ten past Presidents of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the Nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fourteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The primary objective of the Lawyers' Committee is to help develop the legal resources necessary to enforce the civil rights of minorities and poor people. Pursuant to that objective, we seek to enlist the services of the private bar in aid of the individual rights secured by the Constitution and federal civil rights laws. That effort, in our extensive experience, is heavily dependent upon the availability of court-awarded attorneys' fees to plaintiffs who successfully carry on litigation to enforce congressional civil rights policies. Statutory authorization for such awards is a familiar legislative mechanism for encouraging private enforcement of congressional policies. The correct interpretation and implementation of such legislation is critical to a substantial part of the Committee's work. Consequently, for several years we have operated an Attorneys' Fees Project as an adjunct to our substantive litigation activities. Through that project we have provided assistance to Congress in connection with its consideration and passage of civil rights attorneys' fees legislation,[1] and we have participated in litiga-

[1] For example, we presented testimony to Congress during its deliberations on, *inter alia*, the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559 (Oct. 19, 1976), 90 Stat. 2641, amending 42 U.S.C. § 1988.

tion involving the construction of such legislation.[2]

In the case at bar, plaintiffs-respondents, inmates of the Arkansas prison system, have invoked federal-court jurisdiction pursuant to 42 U.S.C. § 1983 and, after protracted litigation, have obtained declaratory and injunctive relief aimed at conforming the operation of the state's prisons to the individual-rights guarantees made applicable to the states by the Fourteenth Amendment to the federal Constitution. Pursuant to the "bad faith" exception to the "American rule" that each litigant must bear his own lawyers' fees, the district court awarded modest attorneys' fees to plaintiffs' counsel, with directions that the award be paid by defendants, officials of the Arkansas Department of Correction (petitioners here), in their official capacities, *i.e.*, out of Department of Correction funds. The Court of Apeals for the Eighth Circuit, primarily relying upon the Civil Rights Attorney's Fees Awards Act of 1976, codified as the last sentence of 42 U.S.C. § 1988, affirmed the district court's award of fees over petitioners' objections that the award is not authorized by § 1983 and is prohibited by the Eleventh Amendment and the principles of state sovereignty embodied therein. *Finney* v. *Hutto*, 548 F.2d 740 (8th Cir. 1977). Petitioners have brought those issues to this Court.

The Lawyers' Committee represents civil rights plaintiffs in a number of lower-court § 1983 cases which involve the same attorneys' fees/Eleventh Amendment issues,[3] and we have appeared as *amicus* in similar cases

[2] In addition to numerous cases in the courts of appeals, we have filed *amicus* briefs with this Court in *Christiansburg Garment Co.* v. *EEOC*, No. 76-1383 (pending); *Stanton* v. *Bond*, 429 U.S. 973 (1976); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974).

[3] *See, e.g., Gates* v. *Collier*, 559 F.2d 241 (5th Cir. 1977); *Wade* v. *Mississippi Cooperative Extension Service*, 424 F.Supp. 1242 (N.D. Miss. 1976).

in this Court.[4] We also have provided representation to litigants in this Court in § 1983 cases concerning the general reach of the Eleventh Amendment,[5] and we have filed *amicus* briefs in cases involving the scope of, and the relief available under, § 1983.[6] The Lawyers' Committee thus has vital interests at stake in this case.

It is our view that the correct and simple answer to this case is, as we argued in our *amicus* brief in *Stanton* v. *Bond*, *supra*, that the Eleventh Amendment is inapplicable to awards of attorneys' fees. Respondents' brief persuasively demonstrates the correctness of that view, and we do not principally concern ourselves herein with the arguments supporting that dispositive answer. Out of an abundance of caution, however, we assume *arguendo* that the Eleventh Amendment applies, as petitioners and their friends argue, and we address the issues raised by that assumption: whether the 1976 Fees Act or § 1983 itself overrides any sovereign immunity from fee awards which the states might have.

The Lawyers' Committee therefore files this brief as friend of the Court urging affirmance of the judgment below.[7]

SUMMARY OF ARGUMENT

I. In the 1976 Fees Act, Congress plainly intended to authorize awards to be paid out of state treasuries. Claiming its power from the Enforcement Clauses of the Thirteenth and Fourteenth Amendments, Congress expressed its will that fees be awarded despite conflicting

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[4] *Stanton* v. *Bond*, *supra*; *Fitzpatrick* v. *Bitzer*, *supra*.

[5] *See, e.g., Milliken* v. *Bradley*, —— U.S. —— (1977).

[6] *See, e.g., Monell* v. *Department of Social Services of the City of New York*, No. 75-1914 (pending).

[7] We do not address the issue on the substantive merits which petitioners have also presented for review.

assertions of state sovereignty. The Act is therefore sufficient to override the sovereign immunity of the states in § 1983/Fourteenth Amendment cases. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). There is no requirement that Congress, in stripping the states of their immunity, must use express statutory language, so long as the congressional intent is clear. *Employees of the Dept. of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279 (1973). In order to accomplish the result it desired, Congress was not required to amend § 1983 itself; the question here is one of permissible remedy, *Edelman* v. *Jordan*, 415 U.S. 651 (1974), which in this instance is explicitly governed by the Fees Act in accordance with the historical function of 42 U.S.C. § 1988. *See, e.g., Moor* v. *County of Alameda*, 411 U.S. 693 (1973). It also is irrelevant that the state is not a named party; the state officials who are petitioners *are* the state for Fourteenth Amendment purposes. *See, e.g., Cooper* v. *Aaron*, 358 U.S. 1, 15-17 (1968); *Ex parte Virginia*, 100 U.S. 339 (1880).

II. Wholly apart from the Fees Act, § 1983 itself overcomes sovereign-immunity defenses (and, consequently, fees may be awarded against states under both the Act and the "bad faith" standard) in suits to enforce the Fourteenth Amendment. As confirmed by the relevant decisions of this Court, *see, e.g., Mitchum* v. *Foster*, 407 U.S. 225 (1972), and by the legislative debates surrounding § 1983's enactment, notions of state sovereignty are completely incompatible with the basic thrust of § 1983. There is no evidence in the legislative history, including that pertaining to the "Sherman amendment" as construed in *Monroe* v. *Pape*, 365 U.S. 167 (1961), that Congress sought to exempt state treasuries from § 1983's reach. The question of the "person"hood of states and state agencies is, at the least, an open one in this Court. *Compare Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 452 (*dictum*), *with Sosna* v. *Iowa*, 419 U.S.

393 (1975). The correct answer is that they, as well as state officials sued in their official capaciites, are suable under, and their sovereign immunity is displaced by, § 1983, at least in suits to enforce the Fourteenth Amendment. *A fortiori*, attorneys' fees are allowable.

ARGUMENT

Introduction

In our *amicus* brief in *Stanton* v. *Bond*, 429 U.S. 973 (1976), we argued that the Eleventh Amendment does not apply to attorneys' fees awarded by the federal courts pursuant to the "bad faith" exception to the "American rule"—*i.e.*, "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . .'"[8] Our argument there, which we deem dispositive, is that lawyers' fees, like costs, merely are one of the "incidents" of litigation for which states are liable "just as any other litigant. . .," *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 168 (1927); that fee awards are not in the nature of monetary relief, but have only that "ancillary effect on the state treasury [which] is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*, [209 U.S. 123 (1908), to which the Eleventh Amendment does not extend]." *Edelman* v. *Jordan*, 415 U.S. 651 (1974).[9] *See also Milliken* v. *Bradley*, —— U.S.

[8] *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258-59 (1975), *quoting F. D. Rich Co., Inc.* v. *Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974); *see also Runyon* v. *McCrary*, 427 U.S. 160, 183-84 (1976).

[9] In *Edelman* the Court provided the following characterizations of the sort of monetary relief, even if equitable in nature, that falls without the sanction of *Ex parte Young*: "award of retroactive payments of the statutory benefits found to have been wrongfully withheld" (415 U.S. at 663); "award of an accrued monetary liability" (*id.* at 664); "payment of . . . money which . . . should have been paid, but was not" (*id.*); payment of " 'state funds to make

—— (1977). The argument has equal applicability to awards under the 1976 Fees Act, which authorizes fees to be assessed "as part of the costs." 42 U.S.C. § 1988. The Court should therefore adhere to its summary disposition of this issue in *Amos* v. *Sims*, 409 U.S. 942 (1972), *aff'g* 340 F.Supp. 691 (M.D. Ala.), as respondents' brief compellingly demonstrates.

If we and respondents are mistaken in our belief that Eleventh Amendment/sovereign immunity principles have no application to fee awards in *Ex parte Young* suits, we submit nonetheless that such immunity as the states may have has been displaced by Congress: first, by the Fees Act, and second, by § 1983 itself. Preliminarily, we observe that the Fees Act was passed in response to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).[10] It has the primary

reparation for the past' " (*id.* at 665); "retroactive payments" (*id.* at 666 n.11); "payment of state funds . . . as a form of compensation" (*id.* at 668); "in practical effect indistinguishable in many respects from an award of damages against the State" (*id.*); and an award "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Id.* An award of attorneys' fees ordinarily is none of these things. *See Bond* v. *Stanton*, 528 F.2d 688 (7th Cir.), *vacated*, 429 U.S. 973 (1976); *Thonen* v. *Jenkins*, 517 F.2d 3, 7-8 (4th Cir. 1975); *Souza* v. *Travisono*, 512 F.2d 1137 (1st Cir.), *vacated on other grounds*, 423 U.S. 809 (1975); *Class* v. *Norton*, 505 F.2d 123 (2d Cir. 1974); *Boston Chapter NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1028 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Gates* v. *Collier*, 70 F.R.D. 341, 347-50 (N.D. Miss. 1976), *aff'd on other grounds*, 559 F.2d 241 (5th Cir. 1977); *Welsch* v. *Likins*, 68 F.R.D. 589 (D. Minn.), *aff'd and adopted*, 525 F.2d 987 (8th Cir. 1975); *Downs* v. *Department of Public Welfare*, 65 F.R.D. 557 (E.D. Pa. 1974); *cf. Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 58 (3d Cir. 1976) (*en banc*); *contra, Skehan* v. *Board of Trustees*, 501 F.2d 31 (3d Cir. 1974), *vacated*, 421 U.S. 983 (1975); *Jordon* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975).

[10] *See, e.g.*, SUBCOMM. ON CONST. RIGHTS OF SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUBLIC LAW 94-559, S.2278)—SOURCE

purpose of insuring access to the courts [11] in, *inter alia*, § 1983 cases against state agencies and officials.[12] We note also that Congress intended the Act to apply to

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BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 10 (Senate Report), 19-20 (remarks of Sen. Mathias), 21 (Sen. Kennedy), 75 (Sen. Hathaway), 138 (Sen. Tunney), 202 (Sen. Abourezk), 210 (House Report), 237 (remarks of Rep. Anderson of Illinois), 245 & 269 (Rep. Seiberling), 247 (Rep. Bolling), 252-53 (Rep. Drinan), 259 (Rep. Railsback), 263 (Rep. Kastenmeier), 264 (Rep. Fish), 267 (Rep. Holtzman) (Comm. Print 1976) [hereinafter, "LEG. HIST."].

LEG. HIST. includes all of the relevant legislative history of the Fees Act, including the floor debates of both the Senate (daily editions fo 122 CONG. REC., September 21-24, 27-29 1976) and the House (daily edition of 122 CONG. REC., October 1, 1976), and the respective reports of the Committees on the Judiciary of both the Senate (S. REP. No. 94-1011 (June 29, 1976) ("Senate Report")) and the House (H.R. REP. No. 94-1558 (Sept. 15, 1976) ("House Report")). The bill that became law was S.2278, which passed the Senate by a vote of 57 to 15 on September 29, 1976. LEG. HIST. 204. The Senate bill was then taken up in the House on October 1, 1976, pursuant to resolution (*id.* at 235, 248-52), where it passed on the same day by a vote of 306 to 68. *Id.* at 275-78. (President Ford approved the law on October 19, 1976.) The House Report pertains to H.R. 15460, a bill virtually identical to S.2278 (*see id.* at 213); the House Report on H.R. 15460 forms a significant part of the Fees Act's legislative history, and it was referred to throughout the debates in the House. *See id.* at 235 (remarks of Rep. Bolling), 236, 237 (Rep. Anderson of Illinois), 248 (Rep. Bauman), 252 (Rep. Drinan), 260 (Rep. Kastenmeier), 271 (Rep. Seiberling). The only substantive difference between H.R. 15460 and S.2278 as it passed the Senate was the omission in the House bill of the provision pertaining to actions brought by the United States under the Internal Revenue Code.

[11] *See, e.g.*, LEG. HIST. 8 & 11 (Senate Report), 19 (remarks of Sen. Hugh Scott), 19-20 (Sen. Mathias), 23 (Sen. Kennedy), 75 (Sen. Hathaway), 199-200 (Sen. Tunney), 202 (Sen. Abourezk), 209 (House Report), 245 (Rep. Seiberling), 263 & 264 (Rep. Kastenmeier), 267 (Rep. Holtzman), 268 (Rep. Jordan).

[12] *See, e.g.*, LEG. HIST. 4 & 5 (Senate Report), 77-79 (remarks of Sen. Helms), 201 (Sen. Kennedy), 213 & 215 (House Report), 253 (Rep. Drinan), 265 (Rep. Fish). In addition to the Court of Appeals for the Eighth Circuit in the judgment below, two other courts of appeals, the First and Fifth Circuits, have held the Fees Act applicable in the specific context of § 1983 litigation against state prison systems or penal institutions. *Gates* v. *Collier*, 559 F.2d 241 (5th Cir. 1977); *King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977); *cf. Martinez Rodriguez* v. *Jimenez*, 551 F.2d 877 (1st Cir. 1977) (Commonwealth of Puerto Rico). *See also Guajardo* v. *Estelle*, 432 F. Supp. 1373 (S.D. Tex. 1977). In the non-prison context other courts have held the Act applicable to § 1983 suits against state-level officials. *See, e.g., Universal Amusement Co., Inc.* v. *Vance*, 559 F.2d 1286 (5th Cir. 1977); *Brown* v. *Culpepper*, 559 F.2d 274 (5th Cir. 1977); *Gay Lib* v. *University of Missouri*, 558 F.2d 848 (8th Cir. 1977); *Bond* v. *Stanton*, 555 F.2d 172 (7th Cir. 1977); *Rainey* v. *Jackson State College*, 552 F.2d 672 (5th Cir. 1977); *Southeast Legal Defense Group* v. *Adams*, 436 F. Supp. 891 (D. Ore. 1977); *White* v. *Crowell*, 434 F. Supp. 1119 (W.D. Tenn. 1977) (three-judge court); *Schmidt* v. *Schubert*, 433 F. Supp. 1115 (E.D. Wis. 1977); *Maynard* v. *Wooley*, —— F. Supp. —— (D. N.H. 1977) (three-judge court); *Gary W.* v. *Louisiana*, 429 F. Supp. 711 (E.D. La. 1977); *Wade* v. *Mississippi Cooperative Extension Service*, 424 F. Supp. 1242 (N.D. Miss. 1977); *cf. Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114 (1st Cir. 1977) (Commonwealth of Puerto Rico). For similar holdings against local governments and their officials, *see, e.g., Miller* v. *Carson*, 563 F.2d 741 (5th Cir. 1977); *Beazer* v. *New York City Transit Authority*, 558 F.2d 97 (2d Cir. 1977); *Franklin* v. *Shields*, —— F.2d —— (4th Cir. 1977); *Seals* v. *Quarterly County Court of Madison County*, 559 F.2d 1221 (6th Cir. 1977); *Planned Parenhood of Minnesota, Inc.* v. *Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977); *Reynolds* v. *Abbeville County School Dist.*, 554 F.2d 638 (4th Cir. 1977); *Stanford Daily* v. *Zurcher*, 550 F.2d 464 (9th Cir. 1977), *cert. granted*, —— U.S. —— (Oct. 3, 1977); *Bogart* v. *Unified School Dist. No. 298*, 432 F. Supp. 895 (D. Kan. 1977); *Commonwealth of Pennsylvania* v. *O'Neill*, 431 F. Supp. 700 (E.D. Pa. 1977); *Gambino* v. *Fairfax County School Dist.*, 429 F. Supp. 731 (E.D. Va. 1977); *Wilson* v. *Chancellor*, 425 F. Supp. 1227 (D. Ore. 1977).

pending cases,[13] and that the lower courts unanimously have discerned and followed this legislative intent.[14]

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[13] *See, e.g.*, LEG. HIST. 202-03 (Sen. Abourezk), 212 n.6 (House Report), 247 (Rep. Anderson), 255-56 (Rep. Drinan), 272-75 (motion by Rep. Ashbrook, to recommit the bill to add an amendment to "exempt from the coverage of this act all of those hundreds of cases which are pending right now," defeated). *See also Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974).

[14] In addition to the cases cited in note 12, *supra*, *see, e.g., Gore* v. *Turner*, 563 F.2d 159 (5th Cir. 1977); *Wharton* v. *Knefel*, 562 F.2d 550 (8th Cir. 1977); *Hodge* v. *Seiler*, 558 F.2d 284 (5th Cir. 1977). For similar holdings with respect to other recent fee provisions, *see, e.g., Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977); *Alphin* v. *Henson*, 552 F.2d 1033 (4th Cir.), *cert. denied*, —— U.S.

The Fees Act, Pub. L. No. 94-559 (Oct. 19, 1976), 90 Stat. 2641, amends REV. STAT. § 722 (42 U.S.C. § 1988) by adding the following thereto:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985-1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 U.S.C. §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

I. IF THE ELEVENTH AMENDMENT IS APPLICABLE, ITS PROTECTIVE SHIELD HAS BEEN REMOVED BY CONGRESS EXERCISING, IN THE FEES ACT, THE POWERS CONFERRED BY § 5 OF THE FOURTEENTH AMENDMENT.

Petitioners, and the four states (hereinafter, "*amici*") which have filed *amicus* briefs supporting petitioners, argue that this case is not controlled by the "incident of litigation" holding of *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927), nor by the "ancillary effect" holdings of *Edelman* v. *Jordan*, 415 U.S. 662 (1974), and *Milliken* v. *Bradley*, —— U.S. —— (1977). Petitioners and *amici* do not view attorneys' fees as a subordinate aspect of a suit authorized by *Ex parte Young*, 290 U.S. 123 (1908). Instead, they see fees as a severable claim for monetary relief more akin to *Hans* v. *Louisiana*, 134

—— (1977); *Lytle* v. *Commissioners of Election of Union County*, 541 F.2d 421 (4th Cir. 1976); *Wallace* v. *House*, 538 F.2d 1138 (5th Cir. 1976).

U.S. 1 (1890), than to *Ex parte Young*. According to their argument, an award of attorneys' fees falls on the "retroactive monetary relief," rather than the "prospective relief," side of the line drawn in *Edelman* v. *Jordan*. Respondents' brief shows that this argument is not sustainable, and we agree with respondents. For purposes of this *amicus* brief, however, we assume *arguendo* the applicability of the Eleventh Amendment and the principles of sovereignty it expresses. On that assumption, the judgment below still must be affirmed, because the Fees Act is an exercise of plenary congressional power authorized by § 5 of the Fourteenth Amendment,[15] which necessarily limits any protection from federal judicial power that the Eleventh Amendment and sovereign-immunity principles might otherwise confer upon the states.

While petitioners and *amici* seem to agree that Congress intended the Fees Act to strip them of any claim of sovereign exemption, and that such a result, validly attained, would not be unconstitutional, they urge nevertheless that in several technical respects Congress has fallen short of its goal. Their principal arguments[16]

[15] In relevant part, §§ 1 and 5 of the Fourteenth Amendment provide as follows:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[16] Among the lesser arguments are some rather amorphous suggestions that fee awards against states run afoul of the Tenth Amendment and other principles of federalism (Miss. Br. 14-15; Penn. Br. 22-23; Calif. Br. 13-14), suggestions that are not made by petitioners. The Chief Justice addressed similar arguments, and rejected them out of hand, in last Term's *Milliken* v. *Bradley*, ——

are these: (1) that any congressional authorization for monetary relief against the states, to be valid and sufficient as against the state-sovereignty defense, must say on its face in so many statutory words that such relief may be awarded against the states (Pet. Br. 8-9; Miss. Br. 6-9; Calif. Br. 12-13; Iowa Br. 5; Penn. Br. 13-14); (2) that Congress may not authorize monetary relief against the states in § 1983 suits in any way other than by an amendment to § 1983 itself expressly defining

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U.S. ——, —— (1977), slip op. 23, a case that imposed on the state treasury for relief costing almost six million dollars. *See id.* at —— (Powell, J., concurring), slip op. 2. We also do not further address Mississippi's contention (Miss. Br. 13-14) that the Fees Act is invalid for want of due process because it "create[s] an irrebuttable presumption that a State is liable for a monetary judgment for attorney's fees whenever one of its officials is the losing party in an action brought under various Federal civil rights statutes." *Id.* at 13. Even if the states are entitled to due process, *but see South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966), there is no factual basis for Mississippi's argument.

In addition, California argues (Br. 13-15) that the Fees Act is not "appropriate legislation" within the contemplation of § 5 of the Fourteenth Amendment (*see* note 15, *supra*). The Act was enacted primarily because of Congress' judgment, in the words of the House Report, that "awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected." LEG. HIST. 217. This hardly is an irrational judgment; indeed, the Court recognized its validity in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 264 (1975). Congress held hearings and engaged in extensive debate; it proceeded firmly yet with care; its response to *Alyeska* was one of dissatisfaction, yet it was a measured response, leaving much of *Alyeska* still intact (*i.e.*, in the non-civil rights public-interest field). Congress based its authority so to act upon, *inter alia*, § 5 of the Fourteenth Amendment. California's attack on that claim is foreclosed by *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *South Carolina* v. *Katzenbach*, *supra*; *Ex parte Virginia*, 100 U.S. 339 (1880). California's invitation to "reevaluate" *Fitzpatrick* (Br. 15) is also groundless. California, and also Iowa and Pennsylvania, would be better advised if they were taking the same position here that they took in *South Carolina* v. *Katzenbach*. *See* 383 U.S. at 307 n.2.

states as being among the "persons" suable thereunder (Pet. Br. 5, 7-9; Miss. Br. 5; Calif. Br. 10-11; Iowa Br. 4, 5-6; Penn Br. 5, 12, 14); and (3) that monetary relief to be satisfied out of state funds is impermissible unless the state is a named party to the lawsuit (Pet. Br. 2 (question presented); Miss. Br. 9-12).

A. The Fees Act Authorizes Fee Awards to Be Assessed Against Funds Belonging to the States, Notwithstanding Sovereign-Immunity Defenses.

It is not disputed that § 1983, along with its jurisdictional counterpart, 28 U.S.C. § 1343(3) (*see* note 27 *infra*), obliges the federal courts to entertain actions against state officials for alleged violations of rights secured by the Fourteenth Amendment. *See, e.g.*, *Sosna* v. *Iowa*, 419 U.S. 393 (1975); *Hagans* v. *Lavine*, 415 U.S. 528 (1974), and cases discussed at pp. 32-35, 51-53, *infra*; *cf. Philbrook* v. *Glodgett*, 421 U.S. 707 (1975) (federal statutory claim); *Edelman* v. *Jordan*, *supra* (same). There also can be no mistake that Congress intended fee awards in such cases ordinarily to be paid out of state funds.

On the floor of the Senate, Senator Helms proposed an amendment to the Act which he described as "affording] protection to financially pressed State and local governments by including them within the bill's exemption from liability granted to the Government of the United States." LEG. HIST. 77. Senator Helms' remarks warrant further quotation, because he specifically called the attention of his colleagues to the fact that the Act subjected state treasuries to liability for attorneys' fees (*id.* at 78-79):

> This legislation provides that State and local governments and their officials can be defendants in cases involving these statutes and that attorneys' fees will "be collected either directly from the official in

his official capacity, from funds of his agency or under his control, or from the State or local government." Presently this legislation potentially places a tremendous burden upon State and local governments. In other public interest law suits where the legal fees have been contested they have ranged from $200,000 to $800,000. Certainly, it is unwise to provide that liability in these amounts be assumed by already financially hard-pressed State and local governments.

Therefore, the amendment I am about to call up would exempt State and local governments.

The Helms amendment (*id.* at 81) was rejected (*id.* at 83-84), as was a similar amendment proposed by Senator Allen. *Id.* at 146, 150-51; *cf. id.* at 181-82 (defeated amendment of Sen. William L. Scott). The Senate entertained no doubts about its power to reach state and local government treasuries, obviously sharing Senator Abourezk's view, expressed just before passage, that "[i]n enacting this legislation we are acting pursuant to section 2 of the 13th Amendment and section 5 of the 14th amendment." *Id.* at 203.

The Senate Report also makes clear Congress' desire to override any efforts to defeat fee awards with claims of state sovereignty. The Report cites *Fairmont Creamery*, LEG. HIST. 11n.6, and it contains the following unequivocal assertion of congressional power over the states (*id.* at 11) (footnotes omitted):[17]

> In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced. We find that the effects of such

[17] The Senate Report is dated June 29, 1976; it was prepared without the benefit of this Court's decision of the day before in *Fitzpatrick* v. *Bitzer*, *supra*. The second sentence in the quotation in text, as California and Pennsylvania suggest (Calif. Br. 12; Penn. Br. 8), indicates that the Senate Report "couched its rationale in terms adopted from *Edelman* v. *Jordan*, *supra*."

> fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance. Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5. As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

Similarly, the House Report (dated September 15, 1976), in a footnote appended to the statement that "[t]he greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities," LEG. HIST. 215, cites *Fitzpatrick* v. *Bitzer*, *supra*, and says: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments." *Id.* at 215 n.14.[18] Similar views were expressed during debate in the House. Representative Drinan, a floor manager of the bill, said that "any question arising under the 11th amendment is resolved in favor of awarding fees against State defendants." LEG. HIST. 255. His relevant remarks in full are (*id.*):

[18] Referring to both the Senate Report (*see* note 17, *supra*) and the House Report, California and Pennsylvania make an elaborate argument to the effect that Congress misconstrued this Court's decisions in *Edelman* and *Fitzpatrick*. Calif. Br. 10-13; Penn. Br. 5-9. Although they are wrong, the point we are making here is not that Congress was correct in its understanding of Eleventh Amendment law, but rather that Congress intended to do all that was necessary to supersede any sovereign immunity that the states might otherwise enjoy.

> The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th amendment. That amendment limits the power of the Federal courts to entertain actions against a State. This issue is no longer seriously in dispute after the recent Supreme Court decision in Fitzpatrick against Bitzer. Since this bill is enacted pursuant to the power of Congress under section 2 of the 13th amendment and section 5 of the 14th amendment, any question arising unde rthe 11th amendment is resolved in favor of awarding fees against State defendants.

Congress plainly intended to overcome any sovereign-immunity defense that might be deemed applicable to fee awards.

B. In Order Validly to Override the Sovereign Immunity of the States Congress Is Not Limited to Express Statutory Language, So Long as the Intent Is Clear.

Notwithstanding the clarity of the legislative will, petitioners and their supporting *amici* claim that Congress committed several critical technical mistakes. One of these alleged technical flaws is the failure of the Fees Act to strip the states of their immunity *in haec verba*. Their argument, in effect, is that Congress should have added these or similar words to the language of the Act: "any claim of state sovereignty or Eleventh Amendment immunity to the contrary notwithstanding."

Strange as the argument is the supporting citation to *Employees of the Dept. of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279 (1973). Mississippi's argument on this point is typical. Citing *Employees*,[19] the state's brief says (p. 6):

[19] In addition to *Employees*, petitioners and *amici* cite a single district court opinion in further support of the proposition in question: *Skehan* v. *Board of Trustees of Bloomsburg State College*, 436 F. Supp. 657 (M.D. Pa. 1977) (alternative holding). This decision relies solely on *Employees*, and it is not persuasive for reasons discussed in text.

> This Court has stated with clarity that courts can look only to the plain, unambiguous and explicit language embodied in a statute enacted by Congress in determining whether Congress has authorized a State to be sued in a particular case.

The holding in *Employees* simply will not bear this interpretation. In fact, *Employees* demonstrates that the congressional intent necessary to overcome the sovereign-immunity defense may be derived from legislative history and other indicia of intent, as well as from the statutory language.

In making its determination in *Employees* that "Congress was silent as to waiver of sovereign immunity of the States," 411 U.S. 286, the Court there said (*id.* at 285) (emphasis added):

> But we have found not a word *in the history of the 1966 amendments* to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts. . . . It would also be surprising in the present case *to infer* that Congress deprived Missouri of her constitutional immunity without changing the old § 16 (b) under which she could not be sued *or indicating in some way* by clear language that the constitutional immunity was swept away.

The italicized portions of the above-quoted language show that the Court did not restrict Congress' legislative prerogatives in the way that petitioners and *amici* contend.

In any event, the Fees Act contains the express statutory override that petitioners and *amici* argue is needed. It explicitly authorizes fees in § 1983 litigation against a background of reported decisions of this Court and the

lower federal courts revealing a multitude of § 1983 cases in which relief has been granted against state officials in their official capacities. In this circumstance, an express statutory authorization to award attorneys' fees in such suits constitutes an explicit refutation of any sovereign-immunity defense. The Fees Act on its face thus precludes the assertions of sovereign exemption made in this case. Congress has done all that reasonably is necessary, and all that the judicial department reasonably ought to require, to achieve the end which all agree it strove to reach.

C. Congress Ws Not Required to Amend § 1983 in Order to Authorize Fee Awards in § 1983 Suits Against State Officials.

The next alleged technical flaw discovered by petitioners and *amici* is the failure of Congress to amend the "person" definition of § 1983 to give express authorization for § 1983 suits against states as such. The argument seems to be that although the federal courts, acting under § 1983 as it now reads, may order state officials in their official capacities to provide relief costing the states millions of dollars, *see, e.g., Milliken* v. *Bradley* (*Milliken II*), *supra*, Congress cannot, by simple statutory authorization, empower these same courts to award attorneys' fees in such cases. Rather, to accomplish that result Congress must amend § 1983's grant of federal-court jurisdiction [20] and explicitly sanction suits against the states as states. The proposition that states *qua* states are not suable under § 1983 relies on *dictum*

[20] Section 1983's "person" limitation is held to be one of subject-matter jurisdiction. *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973); *see also Aldinger* v. *Howard*, 427 U.S. 1, 16-17 (1976); *cf. Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 278-79 (1977) (*dictum*).

in *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 452. *But cf. Sosna* v. *Iowa*, 419 U.S. 393 (1975).[21]

The fundamental error in the states' argument is its treatment of the availability of attorneys' fees under the Eleventh Amendment as a question of subject-matter jurisdiction, or one of authorized cause of action, or both. It is neither, as demonstrated by *Edelman* v. *Jordan*, *supra*, a § 1983 case involving a claim for relief based on the Social Security Act.[22] In *Edelman* the Court held that the district court properly entertained the suit under the doctrine of *Ex parte Young*, but that the Eleventh Amendment "constitute[d] a bar to that portion of the District Court decree which ordered retroactive payment of benefits found to have been wrongfully withheld." 415 U.S. at 678. The evident reason for this conclusion is that the Court could find no specific congressional authorization for the retroactive monetary *relief* which the district court had ordered. The Court noted that "the Social Security Act itself does not create a private cause of action," *id.* at 674, although the Court also acknowledged that "suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States."

[21] In the next Argument we show that there is no basis in § 1983's legislative history or in this Court's decisions for conferring upon states and state agencies the exclusion from § 1983's coverage which the Court has found available to municipalities; nor, in view of § 1983's co-extensive relationship with the Fourteenth Amendment, is there any valid basis for a "prospective relief" limitation on the remedy available in § 1983/Fourteenth Amendment suits against official-capacity state defendants. Here we simply show that there is no need in this case to reach that broader issue.

[22] This case, in contrast, is based on the Fourteenth Amendment. As we point out in the next Argument (*see* pp. 51-53, *infra*), that distinction is critical, for a result different from *Edelman* obtains when the § 1983 case involves a claim under one of the Civil War Amendments which "supersedes contrary exertions of state power." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325 (1966). *See also Fitzpatrick* v. *Bitzer*, *supra*.

Id. at 675. There then follows this critical language (*id.* at 675-77) (emphasis added):

> But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. Though a § 1983 action may be instituted by public aid recipients such as respondent, *a federal court's remedial power*, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young*, *supra*, and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury*, *supra*.

Thus, *Edelman* held that the Eleventh Amendment bar had not been overcome because there was no specific congressional remedial authorization for relief beyond that sanctioned by *Ex parte Young* (to which the Eleventh Amendment is not applicable). In the instant case, a similar analysis leads to a different result with respect to the question of attorneys' fees. Here as in *Edelman*, the injunctive relief ordered by the district court is excluded from the Eleventh Amendment prohibition by the doctrine of *Ex parte Young*. But here, in contrast to *Edelman*, the Fees Act provides the specific legislative authority for the monetary award at issue. And the Act, it will be remembered, amended 42 U.S.C. § 1988,[23] whose historical function has been to instruct

[23] The relationship between § 1983 and the Fees Act (amending § 1988) is not accidental. Section 1988 derives from § 3 of the Civil Rights Act of April 9, 1866, 14 Stat. 27. The entire 1866 Act was re-enacted, following passage of the Fourteenth Amendment, by § 18 of the Enforcement Act of May 31, 1870, 16 Stat. 140. When § 1983 was passed a year later, it specifically incorporated the remedial-law provisions of the 1866 Act. *See* § 1 of the 1871 Act, quoted in note 27, *infra*. Codification in 1874 resulted in § 1988's ancestor becoming REV. STAT. § 722, which was made applicable to

federal courts as to the scope and kinds of remedies to be afforded in, *inter alia*, § 1983/Fourteenth Amendment cases. *See, e.g.*, *Moor* v. *County of Alameda*, 411 U.S. 693 (1973).

In sum, the issue in this case is whether the particular remedy (attorneys' fees), manifestly authorized by Congress, is available in light of the Eleventh Amendment. The answer to this question in no way implicates an extension of the cause of action or of the district court's

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the civil-rights civil and criminal provisions of the Revised Statutes, including the provision now codified as § 1983. *See Moor* v. *County of Alameda*, 411 U.S. 693, 704-05 & nn. 18 & 19 (1973). As now codified in Title 42 of the United States Code, § 1988 (without the Fees Act) provides as follows (with only technical differences from the language of the Revised Statutes, owing to differences in the organization of the two codes):

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Section 1988 has been judicially construed as being "intended to complement the various [civil rights] acts," *Moor* v. *County of Alameda*, *supra*, 411 U.S. at 702, by directing application of the remedial rule that "better serves the policies expressed in [such acts]." *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 240 (1969). Prior to the Fees Act, however, it was held that § 1988, in the absence of one of the historical equitable exceptions to the "American rule" recognized in *Alyeska*, did not authorize an award of attorneys' fees to prevailing civil-rights litigants. *Runyon* v. *McCrary*, 427 U.S. 160, 184-86 (1976).

subject-matter jurisdiction, the validity of both being conceded and otherwise not disputable. The fees award is specifically authorized by the Fees Act, which to that extent displaces any protection that the Eleventh Amendment would otherwise give the states. Whether a general damages remedy is available against the states under § 1983, and whether the states are suable under § 1983 for such relief, are questions which are not pertinent to the narrow issue before the Court.

D. It Also Is Irrelevant That the State Is Not a Named Party.

In the statement of their first question presented, petitioners seem to take issue with the fact that the fee award assertedly was made against the state, "which was not a party to the suit." Pet. Br. at 2. (In the court below petitioners apparently questioned the absence of the Department of Correction as a named party, *see* 548 F.2d at 742 (Pet. App. 5).) Petitioners do not return to this question, but Mississippi takes it from there and argues that Arkansas is an "absent indispensable party to this action." Miss. Br. 9-12. Mississippi relies upon decisions of this Court which are not in point,[24] and FED. R. CIV. P. 19.

There is no possible merit to this "absent party" argument, which contradicts the established rule that the

[24] Mississippi cites the following cases: *Durfee* v. *Duke*, 375 U.S. 106, 115 (1963); *Arkansas* v. *Tennessee*, 246 U.S. 158, 176 (1918); *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 75 (1961); *Christian* v. *Atlantic & N.C. R.R.*, 133 U.S. 233 (1890); and *Belknap* v. *Shild*, 161 U.S. 11, 18 (1896). The passages in *Christian* and *Belknap* relied upon by Mississippi are no more than statements that the precise circumstances covered by the Eleventh Amendment (diversity suits against states) may not be circumvented merely by suing state officers for the same relief. The language relied upon from the other cases is also inapposite, because in each instance it pertains to a situation where a state is not present or represented in any fashion by a party in a suit affecting the state's concrete interests.

Eleventh Amendment may come into play "even though the State is not named a party to the action." *Edelman*, *supra*, 415 U.S. at 663; *see also*, *e.g.*, *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945).[25] More fundamentally, the argument misapprehends the nature of states *vis-a-vis* the Fourteenth Amendment and the Amendment's understanding of the manner in which states act. As the first Mr. Justice Harlan put it in *Chicago, B. & Q. R.R.* v. *City of Chicago*, 166 U.S. 226, 233-34 (1896), *citing, inter alia, Ex parte Virginia*, 100 U.S. 339, 346, 347 (1880):

> But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, "violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state." This must be so, or, as we have often said, the constitutional prohibition has no meaning, and "the state has clothed one of its agents with power to annul or evade it."

See also United States v. *Reese*, 92 U.S. 214, 249-52 (1876) (Hunt, J., dissenting). This Court specifically

[25] Mississippi's argument, therefore, runs counter to the settled principle that the Eleventh Amendment's applicability "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding as it appears from the entire record." *Ex parte New York*, 256 U.S. 490, 500 (1921). On another occasion, Mississippi has argued that it could not be made a party in a voting-rights case brought by the United States under 42 U.S.C. § 1971, because "the Fifteenth Amendment 'is directed to persons through whom a state may act and not to the sovereign entity of the state itself.'" *United States* v. *Mississippi*, 380 U.S. 128, 138 (1965). The Court was unanimously unimpressed with that position; Mississippi's *amicus* argument in this case merits a similar fate.

bound the State of Arkansas to that understanding in the historic nine-Justice opinion in *Cooper* v. *Aaron*, 358 U.S. 1, 15-17 (1958), and the question is not open for debate.

In this case Arkansas prison officials, including petitioners here, acting "in the name and for the state," have operated a system of prisons in violation of the Fourteenth Amendment. From that "point of view . . . they stand in this litigation as the agents of the State." *Id.* at 16. In the Fees Act, by authorizing fees to be paid out of relevant state or state-agency funds, Congress has done no more than adhere to the straightforward scheme of the Fourteenth Amendment. Conceivably, there could be actions in which relief is sought against a state without its knowledge or participation, and which therefore should be disallowed (*cf.* note 24, *supra*), but this is not such a case. This is the precise case contemplated by both Congress and the Fourteenth Amendment.

II. SECTION 1983 ITSELF PROVIDES FOR MONETARY AWARDS AGAINST STATES AND THEIR AGENCIES AND OFFICIALS; IT IS AN EXERCISE OF CONGRESSIONAL POWER AUTHORIZED BY THE FOURTEENTH AMENDMENT; THE ELEVENTH AMENDMENT IS EITHER INAPPLICABLE TO OR SUPPLANTED BY § 1983/FOURTEENTH AMENDMENT SUITS.

Section 1983, like the Fees Act and like the provisions of Title VII considered in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), is an exercise by Congress of the plenary power conferred by § 5 of the Fourteenth Amendment (*see* note 15, *supra*) which necessarily limits the sovereign immunity of the states. Petitioners and *amici* are wrong in their view that § 1983 must be amended in order for it to authorize monetary relief against state-owned funds; without regard to the Fees Act, the courts below possessed ample authority under § 1983 to award fees against petitioners under the "bad faith" exception—again, assuming

arguendo the applicability of the Eleventh Amendment to such awards of attorneys' fees. Before addressing the principal § 1983 question, we reiterate, by brief summary, the broader and more fundamental view of the Eleventh Amendment's scope which we advanced as friend of the Court in *Fitzpatrick* v. *Bitzer*, *supra*.

A. The Eleventh Amendment Is Not Applicable To Federal-Question Suits Against The States.

In our brief in *Fitzpatrick* v. *Bitzer*, *supra*, we argued that, as a threshold matter, the reach of the Eleventh Amendment does not extend to federal-question claims against the states. *See* Brief for the Lawyers' Committee for Civil Rights Under Law, et al., As *Amici Curiae*, in No. 75-251, at pp. 10-28. We adhere to that view and continue to urge it as a correct interpretation of Eleventh Amendment/sovereign immunity principles. Briefly summarized, the argument is that the Eleventh Amendment was designed to restore the Framers' original understanding of Article III's diversity clause as not conferring federal judicial power over *state-law* claims against unconsenting states—the understanding expressed by Alexander Hamilton in THE FEDERALIST NOS. 32 & 81, and by Justice Iredell in his dissent in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793)—*not* to withdraw federal judicial power with respect to *federal-question* claims against the states. That original understanding was correctly construed in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), but it was misapprehended in *Hans* v. *Louisiana*, 134 U.S. 1 (1890), which is the source of all of the modern confusion about the meaning of the Eleventh Amendment and the principle of state sovereignty embodied therein.

In *Fitzpatrick* the Court did not, and did not need to, reach the above argument. Instead, the Court rested its decision on the narrower ground that Congress is empowered by the Fourteenth Amendment, whose "substan-

tive provisions . . . themselves embody significant limitations on state authority" (427 U.S. at 456), to subject the states (there through Title VII) to the full remedial powers of the federal courts. A similar Fourteenth Amendment ground of decision is available in this case.

B. In § 1983/Fourteenth Amendment Suits, the States Are Divested of Sovereign-Immunity Defenses.

1. *The historic significance of § 1983 and the relevant decisions of this Court.*

As the Court reconfirmed in *Fitzpatrick* v. *Bitzer*, the very words of the Fourteenth Amendment preclude a construction of the Amendment's guarantees which would subordinate them in any way to pre-Amendment notions of state sovereignty.[26] It would be surprising to learn that § 1983's ancestor, the Civil Rights Act of 1871—entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," 17 Stat. 13, and passed but three years after the Amendment's ratification—did not manifest similar antipathy toward the claimed sovereignty of the states. Section 1 of the Act (from which § 1983 specifically derives), conferred federal-court jurisdiction over law and equity actions arising under the Fourteenth Amendment.[27] Sections 2 and 6 of the Act

[26] Proof that the Fourteenth Amendment displaced, and was intended to displace, claims of sovereign right on the part of the states—*i.e.*, that the Amendment "involves a corresponding diminution of the governmental powers of the States[; i]t is carved out of them," *Ex parte Virginia*, 100 U.S. 339, 346 (1880)—is fully detailed in the Brief for the United States As Amicus Curiae in Nos. 75-251 & 75-283, *Fitzpatrick* v. *Bitzer*, and in the Brief *Amicus Curiae* of the NAACP Legal Defense and Educational Fund, Inc., in No. 72-1410, *Edelman* v. *Jordan*.

[27] As passed, § 1 of the Act of April 20, 1871, 17 Stat. 13, read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

In 1874 Congress separately codified the cause-of-action and jurisdictional parts of § 1, the former becoming REV. STAT. § 1979 and the latter being divided into two sections: REV. STAT. § 563(12) (district courts) and § 629(16) (circuit courts). The cause-of-action part now appears as 42 U.S.C. § 1983 (although Title 42 of the United States Code has not been enacted into positive law, the language of § 1983 is identical to that appearing in the Revised Statutes (§ 1979)):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The jurisdictional provisions is now 28 U.S.C. § 1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • • •
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

The evolution process is informatively traced in *Blue* v. *Craig*, 505 F.2d 830 (4th Cir. 1974) (Russell, J.). The only significant change in wording from the original 1871 Act appears in connection with the addition in 1874 of the words "and laws," so that § 1983 author-

contained comprehensive civil and criminal prohibitions against civil rights conspiracies, §§ 3 and 4 gave the President ultimate discretion to intervene into state affairs with armed force and to suspend the writ of habeas corpus, and § 5 prescribed a detailed loyalty oath for jurors in federal court. All engendered heated debate.[28]

The 1871 Act was the first extensive legislation enacted by Congress pursuant to § 5 of the Fourteenth Amendment, which had been adopted in 1868.[29] Not surprisingly,

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izes redress for "the deprivation of rights, privileges, or immunities secured by the Constitution *and laws* . . . ." (Emphasis added). *See Hagans* v. *Lavine*, 415 U.S. 528, 533 n.5 (1974); *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 543 n.7 (1972). Also, the phrase "equal rights" as a limitation in § 1343(3) appeared for the first time in the 1874 grant of circuit-court jurisdiction (REV. STAT. § 629(16)), though not in the cause-of-action (§ 1979) and district-court jurisdiction (§ 563(12)) authorizations. Of these language changes, the Court has said: "Despite the different wording of the substantive and jurisdictional provisions, when the § 1983 claim alleges constitutional violations, § 1343(3) provides jurisdiction and both sections are construed identically." *Id.* at 544 n.7, *citing Douglas* v. *City of Jeannette*, 319 U.S. 157, 161 (1943).

[28] The Court has noted that § 1 of the Act was not the most hotly contested feature of the bill. *See Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 164-65 (1970); *Monroe* v. *Pape*, 365 U.S. 167, 181 (1961). Section 1 hardly went unnoticed, however. While some of the opponents of other sections of the bill did not oppose § 1 (*see, e.g.*, GLOBE 419 (Rep. Bright)), others did express strenuous opposition to § 1's transfer of jurisdiction over constitutional causes of action from the state courts to the federal courts, as will be discussed at greater length in text. *See id.* at app. 50 (Rep. Kerr), 337 (Rep. Whitthorne), 352, 353 (Rep. Beck), 361 (Rep. Swann), app. 86 (Rep. Storm), 395 (Rep. Rice), 416 (Rep. Biggs), app. 91-92 (Rep. Duke), app. 258 (Rep. Holman), app. 179-80 (Rep. Voorhees), app. 215 (Sen. Johnston), app. 241, 243 (Sen. Bayard), app. 216-17 (Sen. Thurman), 645 (Sen. Davis). ["GLOBE" refers to CONG. GLOBE, 42d Cong., 1st Sess. (1871). The presence of "app." indicates that the page reference is to the "Appendix" to the *Congressional Globe* for that session of Congress, rather than to the main part.]

[29] Two civil rights acts—the Enforcement Act of May 31, 1870, 16 Stat. 140, and the Force Act of February 28, 1871, 16 Stat. 433—

much of the 1871 congressional debate echoed that of 1868, when the Amendment itself had been debated by the First Session of the Thirty-Ninth Congress prior to its submission to the people. In support of the 1871 Act, Representative Bingham (whom Justice Black has called "the Madison of the first section of the Fourteenth Amendment"[30]) reiterated the views he had expressed in 1866 (*cf.* CONG. GLOBE, 39th Cong., 1st Sess. 1088-90, 2542-43 (1866)) as he stated the convictions of the Republican majority of the Reconstruction Congress (GLOBE app. 85):[31]

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intervened between adoption of the Fourteenth Amendment and enactment of § 1983. Both of these intervening acts primarily were to enforce the voting guarantees of the Fifteenth Amendment, although § 18 of the 1870 Act re-enacted (pursuant to the Fourteenth Amendment) the 1866 Civil Rights Act, *see Runyon* v. *McCrary*, 427 U.S. 160, 168 n.8 (1976), in order to resolve all doubts about the earlier Act's validity under the Thirteenth Amendment. *See Hague* v. *C.I.O.*, 307 U.S. 496, 509-10 (1939).

[30] *Adamson* v. *California*, 332 U.S. 46, 74 (1947) (dissenting opinion). Bingham was a member of the Joint Committee on Reconstruction which drafted the Fourteenth Amendment. Bingham had drafted an earlier version, introduced in each House of Congress on February 13, 1866, which merely empowered Congress to enact laws protecting civil rights (including "equal protection"). This proposal contained no substantive guarantees. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866). This initial proposal ran into trouble, and the Joint Committee was forced to reconvene. At this time Bingham drafted the language which ultimately became the second sentence of § 1 of the Fourteenth Amendment. Approved by the Joint Committee on April 28, this revised draft "marked a real advance upon earlier proposals. This was no longer a mere grant of power to Congress, but a self-executing positive provision barring the states from restricting civil rights." 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES; CIVIL RIGHTS 215 (1970). "It converted the Fourteenth Amendment from a grant authorizing Congress to protect civil rights to a self-operating prohibition which could be enforced by the courts though there had been no congressional action in the matter." *Id.* at 293.

[31] *See also, e.g.*, GLOBE 339 (Rep. Kelley), 428-29 (Rep. Beatty), 448 (Rep. Butler), 459 (Rep. Coburn), 487-88 (Rep. Lansing), app. 202 (Rep. Snyder), app. 187 (Rep. Willard), 651 (Senator Sumner).

The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizens had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?

In opposition, Representative Arthur, with specific reference to § 1 of the Act, decried on behalf of the Democrat minority that Congress was running roughshod over the states (GLOBE 365):[22]

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[22] *See also, e.g.*, GLOBE 366 (Rep. Arthur); 338 (Rep. Whitthorne), 373 (Rep. Archer), app. 87 (Rep. Storm), 378 (Rep. Shober), app. 206-09 (Rep. Blair), 416 (Rep. Biggs), app. 89-90 (Rep. Duke), 454 (Rep. Cox), app. 260 (Rep. Holman), app. 148 (Rep. Lanison), 599-600 (Rep. Saulsbury), app. 241 (Rep. Bayard). The remarks just referred to and others like them reveal that the Democrats, although they were in a minority, were well-schooled in the art of advocating the sovereignty of the states. As Justice Frankfurter has noted, many of the men who comprised the Congress during these days were notably competent lawyers. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 366-67 & n.22 (1959). It therefore is of particular interest that the Democrats in 1871, despite their capable advocacy of the "rights" of the states, did not place any reliance on the Eleventh Amendment. They researched the decisions of this Court, they traced the sovereignty of the states back to the Articles of Confederation, they quoted the Constitution's guarantee (Art. IV, § 4) to the states of a republican form of government, they examined THE FEDERALIST and the debates of the Constitutional Convention, they repeatedly relied upon the Tenth Amendment—yet we have found only one oblique reference (GLOBE app. 160 (Rep. Galloday)) in the entire 1871 debates to the Eleventh Amendment. This significant omission reinforces our view (subsection IIA, *supra*) that the Eleventh Amendment was never intended to apply to federal-question disputes.

> It overrides the reserved powers of the States. It reaches out and draws within the despotic circle of central power all the domestic, internal, and local institutions and offices of the States, and then asserts over them an arbitrary and paramount control as of the rights, privileges, and immunities secured and protected, in a peculiar sense, by the United States in the citizens thereof. Having done this, having swallowed up the States and their institutions, tribunals, and functions, it leaves them the shadow of what they once were. They are nominally what they should be as of sovereign right. And so long as they remain servile, appliant, and subservient, the mailed hand of central power is stayed. But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment, they are liable, and most certain, at the suit of any knave, plain or colored, under the pretext of the deprivation of his rights, privileges and immunities as acitizen, par excellence, of the United States, to be summarily stripped of official authority, dragged to the bar of a distant and unfriendly court, and there placed in the pilory of vexatious, expensive, and protracted litigation, and heavy damages and amercements, destructive of health and exhaustive of means, for the benefit of unscrupulous adventurers or venal minions of power.

This Court has recalled that "[a] pervasive sense of nationalism led to enactment of the Civil Rights Act of 1871. . . ." *Steffel* v. *Thompson*, 415 U.S. 452, 463 (1974). *See also Zwickler* v. *Koota*, 389 U.S. 241, 246-47 (1967). As described in F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 64 (1928):

> Sensitiveness to "states' rights", fear of rivalry with state courts and respect for state sentiment, were swept aside by the great impulse of national feeling born of the Civil War. Nationalism was triumphant; in national administration was sought its vindication. The new exertions of federal power were no longer trusted to the enforcement of state agencies.

Section 1 of the 1871 Act, now § 1983, clearly was one of these "new exertions of federal power." This particular exercise took the form of a jurisdictional grant to the federal courts, giving them authority to entertain Fourteenth Amendment causes of action.[32] "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardian of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum*

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[32] As mentioned previously (*see* note 28, *supra*, and pp. 34-35, *infra*), the opponents of § 1 of the 1871 Act focused their complaints on the jurisdictional transfer to the federal courts. For the same reason, the Act received the support of other members of Congress (*see also* pp. 46-48, *infra*): "Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." GLOBE 376 (Rep. Lowe). "We believe that we can trust our United States courts, and we propose to do so." *Id.* at 460 (Rep. Coburn). *See also id.* at 476 (Rep. Dawes). And Senator Pool said (*id.* at 609):

> I yet hope it is possible to escape more violent means by a prompt resort to the ordinary Federal tribunals of justice. Unless that resort be promptly and efficiently taken there is no hope of escaping for another year the application of the most stringent and ruinous military measures.

v. *Foster*, 407 U.S. 225, 242 (1972), *quoting Ex parte Virginia*, *supra*, 100 U.S. at 346. As the Court explained in *District of Columbia* v. *Carter*, 409 U.S. 418, 427 (1973):

> To the Reconstruction Congress, the need for some form of federal intervention was clear. It was equally clear, however, that Congress had neither the means nor the authority to exert any direct control, on a day-to-day basis, over the actions of state officials. The solution chosen was to involve the federal judiciary.

"During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws." *Zwickler* v. *Koota*, *supra*, 389 U.S. at 245. But "[w]ith the growing awareness that this reliance had been misplaced,[34] . . . Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials." *District of Columbia* v. *Carter*, *supra*, 409 U.S. at 428.

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

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[34] As the Court documented in *Mitchum* v. *Foster*, 407 U.S. at 240-42, the state courts were deemed by the Congress of 1871 to have defaulted in their obligations to enforce the Fourteenth Amendment. "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute [Act of March 2, 1793, 1 Stat. 335] was enacted." *Id.* at 242.

Monroe v. *Pape*, 365 U.S. 167, 180 (1961); *see also id.* at 193 (Harlan, J., concurring). As summarized in *Mitchum* v. *Foster*, *supra*, 407 U.S. at 242:

> This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Elsewhere we have detailed the legislative history showing that Congress' purpose in § 1983 was to establish a federal-court action for relief as broad as the Fourteenth Amendment would allow.[35] Typical of that history is Senator Thurman's unavailing complaint that "there is no limitation whatsoever upon the terms that are employed [in § 1983], and they are as comprehensive as can be used." GLOBE app. 217. He said (*id.* at app. 216):

> This section relates wholly to civil suits. It creates no new cause of action. Its whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever as to the amount in controversy . . . . I am certainly not in favor of denying to any man who is deprived unlawfully of his right, his

[35] *See* Brief for National Education Association and Lawyers Committee for Civil Rights Under Law, as Amici Curiae, in No. 75-1914, *Monell* v. *Department of Social Services of City of New York* (argued November 2, 1977), at pp. 5a-13a [hereinafter "*Monell Amici* Br."].

> privilege, or his immunity, under the Constitution of the United States, that redress to which every man is entitled whose rights are violated; but I do think that it is a most impolitic provision, that in effect may transfer the hearing of all such cases into the Federal courts.

In the light of the foregoing, it is not possible, as petitioners and *amici* in the case at bar seem to contend, that this Congress of 1871, acting for the express purpose of enforcing the Fourteenth Amendment (which specifically speaks to states) and in the face of opposition charges that the sovereignty of the states was being eroded, intended § 1983's grant of an "action at law [and] suit in equity" to be circumscribed by the sovereign-immunity claims of the most likely types of § 1983 defendants, state agencies and officials. Nor is it conceivable that this Congress in this statute—deemed to be "an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment," *Mitchum* v. *Foster*, *supra*, 407 U.S. at 238—intended a federal court to stop short of affording complete justice when it encountered a defense of state sovereign immunity.

2. *The language and legislative history of § 1983.*

The position of petitioners and *amici* warrants repetition of that part of § 1983's original language (*see* note 27, *supra*) providing that the constitutional wrongdoer, acting "under color of any law, statute, ordinance, regulation, custom, or usage of any State . . . shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured. . . ." The italicized phrase was not placed in the 1874 recodification (REV. STAT. § 1979), probably because the revisers thought it was surplusage. The phrase serves to demonstrate, however, that Congress did not intend unconstitutional state action of any kind

to be beyond the reach of the statute. Consistent with this plain language, the Court's decisions quoted above (and the legislative history there referred to) make it abundantly clear that "state officials," "state instrumentalities" and "state agencies" were § 1983's principal targets.

Petitioners and *amici* rely, however, on § 1983's asserted "person" limitation with respect to those who are made suable in federal courts. A state, they say, is not a "person" subject to § 1983 federal judicial power; therefore, a § 1983 suit which seeks money (even an award of attorneys' fees) payable out of state funds is to that extent a suit against a non-"person," even though the "prospective relief" aspects of the action are proper. This conclusion is not based on anything in the legislative history of § 1983 relating to the definition of "person." Indeed, it is not even based on legislative history pertaining to the suability of states. The argument rests, rather, on an inference drawn from this Court's holding in *Monroe* v. *Pape*, 365 U.S. 167, 187-92 (1961), that municipalities are not § 1983 "persons." That decision, in turn, was based on an inference drawn from the fate of the so-called "Sherman amendment" which would have amended the 1871 Act by making municipalities absolutely liable, without fault, for riot damages occurring within their jurisdiction.[36] Regardless of the correctness of the *Monroe* interpretation, the added inference sought by petitioners and *amici* simply is not supportable.

If we could ask the Congressmen of 1871 whether they intended states as such to be made suable under § 1983 as named party defendants—a question which the lower courts periodically feel constrained to raise and answer [37]

[36] *See Monell Amici* Br. 17a-19a, nn. 47 & 51.

[37] *See, e.g., Rochester* v. *White*, 503 F.2d 263 (3d Cir. 1974), and Third Circuit cases cited *id.* at 266 n.6; *Cheramie* v. *Tucker*, 493 F.2d 586 (5th Cir.), *cert. denied*, 419 U.S. 868 (1974); *Collins*

—the answer probably would be that the question misses the point, because it was assumed by all that the Four-

v. *Moore*, 441 F.2d 550 (5th Cir. 1971); *Zuckerman* v. *Appellate Division*, 421 F.2d 625 (2d Cir. 1970); *Diamond* v. *Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Deane Hill Country Club, Inc.* v. *City of Knoxville*, 379 F.2d 321 (6th Cir.), *cert. denied*, 389 U.S. 975 (1967); *Williford* v. *California*, 352 F.2d 474 (9th Cir. 1965); *United States ex rel. Lee* v. *Illinois*, 343 F.2d 120 (7th Cir. 1965); *Gras* v. *Stevens*, 415 F. Supp. 1148 (S.D. N.Y. 1976) (three-judge court). This reasoning has been extended also to state agencies and other state-level instrumentalities. *See, e.g., Huntley* v. *North Carolina State Bd. of Educ.*, 493 F.2d 1016, 1017 n.2 (4th Cir. 1974) (state board of education); *Curtis* v. *Everette*, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974) (state bureau of corrections); *Allison* v. *California Adult Authority*, 419 F.2d 822 (9th Cir.), *cert. denied*, 394 U.S. 966 (1969) (state adult authority and state department of corrections); *Cheramie* v. *Tucker*, *supra* (state highway department); *Zuckerman* v. *Appellate Division*, 421 F.2d 625 (2d Cir. 1970) (state courts); *Coopersmith* v. *Supreme Court of Colorado*, 465 F.2d 993 (10th Cir. 1972) (same); *Moity* v. *Louisiana State Bar Ass'n*, 414 F. Supp. 180 (E.D. La. 1976) (same); *Protrollo* v. *University of South Dakota*, 507 F.2d 775, 777 n.1 (8th Cir. 1974), *cert. denied*, 421 U.S. 952 (1975) (state university and its board of regents); *Blanton* v. *State University of New York*, 489 F.2d 377 (2d Cir. 1973) (same); *cf. Gay Students Organization* v. *Bonner*, 509 F.2d 652 (1st Cir. 1974); *Coopersmith* v. *Supreme Court of Colorado*, 465 F.2d 993 (10th Cir. 1972) (state bar association); *Clark* v. *Washington*, 366 F.2d 678 (9th Cir. 1966) (same); *cf. Moity* v. *Louisiana State Bar Ass'n*, *supra*; *Sherman* v. *Dellums*, 417 F. Supp. 7 (C.D. Calif. 1973) (state fair employment practices commission). *Contra, Forman* v. *Community Services, Inc.*, 500 F.2d 1246 (2d Cir. 1974), *rev'd on other grounds sub nom. United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975) (state housing finance agency); *Stebbins* v. *Weaver*, 396 F. Supp. 104 (W.D. Wis. 1975); *Marin* v. *University of Puerto Rico*, 377 F. Supp. 613 (D. P.R. 1974). None of the above non-"person" decisions were based on analysis of the legislative history of § 1983. Rather, their uniform rationale is the superficial one that if the "political subdivisions of a state, *i.e.*, municipalities and counties . . . were not 'persons' under § 1983, the state itself was obviously not such a 'person' and therefore, the entities through which the state functions should be excluded." *Adkins* v. *Duval County School Board*, 511 F.2d 690, 693 (5th Cir. 1975). Aside from the fact that the logic of this analysis ultimately reduces § 1983 to a virtually meaningless statute, we show below (pp. 48-53, *infra*) that, despite their superficial appeal, these decisions are completely mistaken.

teenth Amendment empowered Congress to bring the states, as states and in their legislative capacities, to heel. The issue mooted in the debates, rather, was: how much farther than that may Congress go? How far down into the states and their functions may Congress reach? We of course know the answer to be that whoever acts for the state, even the lowliest of the state's local functionaries, is subject to the Fourteenth Amendment and to congressional action thereunder: "Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Ex parte Virginia*, *supra*, 100 U.S. at 347. That is the answer given in 1880 to the question Congress debated in 1871. Examination of that debate is informative with respect to the controversy at hand.

One of the recurring objections to the 1871 Act was the contention that the Fourteenth Amendment operated against the states only with respect to discriminatory legislation; that the Amendment, in the words of one opponent, is "prohibitory only on the legislation of the States." GLOBE 455 (Rep. Cox). This position accordingly held that Congress' authority to enforce the Fourteenth Amendment did not extend to forms of state action other than to discriminatory or otherwise unlawful legislation. *See, e.g., id.* at 420 (Rep. Bright), 429 (Rep. McHenry), 600 (Sen. Saulsbury), 661 (Sen. Vickers), app. 160 (Rep. Golladay), app. 208-09 (Rep. Blair of Missouri), app. 231 (Sen. Blair), app. 259 (Rep. Holman). Representative of this point of view are the remarks of Senator Thurman, leader of the opposition in the Senate (app. 221):

> And so, too, in regard to the limitation upon the power of the States that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The language of the Constitution is that the State shall not do it; and what is the State? The State is a word used with several significations. It may sometimes be used, and frequently is used, in a geographical sense, to mean the territory. At other times it is used to describe the whole collective body of the people; but in its political significance it is used in the sense in which it is here used, to signify the government of the State. It is not simply some judge sitting in Alamance county; he is not the State of North Carolina; much less some constable or sheriff in Caswell county. The State of North Carolina, in this sense, is that political autonomy which makes the government, and it is the denial by that government, and not by some individual, although he is clothed with a commission, that constitutes a denial by the State.
>
> Would it be said to be a denial by the United States of any right if some district judge in Kansas or Florida should make a decision that really infringed the rights of an individual? Would it be said that the Government was guilty of a denial of right in that case, when that very man would, if his motive was corrupt, be impeached before this Senate and convicted and turned out of office by this very Government?
>
> When, therefore, it is said that no State shall deny the equal protection of the laws, the natural meaning of it is that no State shall make laws which deny equal protection to all the people who are residing in it, and that is the only safe meaning to give it; because otherwise you would blot the States out of existence by the broad construction that has been contended for.

The proponents of the legislation flatly rejected this view of the Fourteenth Amendment. Throughout the de-

bates they focused on the conduct of state officials and state institutions and other instrumentalities of state government. "The laws must not only be equal on their face," said Representative (later President) Garfield, "but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive officers of the State." GLOBE app. 153. Clearly it was with the administration of state laws that they were most concerned. *See also, e.g.*, GLOBE 321 (Rep. Stoughton), 334-35 (Rep. Hoar), 375 (Rep. Lowe), 394 (Rep. Rainey), 426 (Rep. McKee), 429 (Rep. Beatty), 444-45 (Rep. Butler), 459 (Rep. Coburn), 482 (Rep. Wilson of Indiana), 607-08 (Sen. Pool), 696-97 (Sen. Edmunds), app. 72 (Rep. Blair of Michigan), app. 80 (Rep. Perry), app. 147 (Rep. Shanks), app. 152-53 (Rep. Garfield), app. 182 (Rep. Mercur), app. 185-86 (Rep. Platt), app. 300 (Rep. Stevenson), app. 309-10 (Rep. Maynard), app. 314-15 (Rep. Burchard). Speaking specifically to the argument that the Fourteenth Amendment is addressed only to state legislation, Representative Lowe said (GLOBE 375):

> I understand the argument to be that inasmuch as the alleged lawless acts sought to be corrected by the bill are not done in pursuance of any law or act of the States, that as there is no State authority or laws impeding the citizens in the enjoyment of their rights, the section [§ 1 of the Fourteenth Amendment] quoted does not apply. It is said that the States are not doing the objectionable acts. This argument is more specious than real. Constitutions and laws are made for practical operation and effect. They have certain ends to accomplish, and must be understood as tending to accomplish the objects sought. What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislation of a State? If a State has no law upon its statute book obnoxious to objection under the article referred to, but nevertheless permits

> the rights of citizens to be systematically trampled upon without color of law, of what avail is the Constitution to the citizen?
>
> The argument leads to the deduction that while the first section of the amendment prohibits all deprivation of rights by means of State laws, yet all rights may be subverted and denied, without color of law, and the Federal Government have no power to interfere. All you have to do, therefore, under this view, to drive every obnoxious man from a State, or slay him with impunity, is to have the law all right on the statute-book, but quietly permit rapine and violence to take their way, without the hinderance of local authorities. Such a position, Mr. Speaker, defeats itself by its own absurdities. The rights and privileges of citizens are not only not to be denied by a State but they are not to be deprived of them.

And Representative Wilson of Indiana made similar comments (*id.* at 482):

> But it must be observed, and I think it is conclusive against any such construction, that this language cannot fairly or reasonably be construed to refer exclusively to denial by statutory enactment. If such had been the meaning the language would have been "no law shall be enacted," or "no Legislature shall enact," &c., indicating in explicit terms that it was a statutory denial that was meant.
>
> But the language is "no State shall deny." What is meant by the word "State?" Obviously the word is used in its largest and most comprehensive sense. It means the government of the State. What is a State in its true sense? It is a government, not a mere legislative body empowered to enact laws; it is a trinity: the legislative, the judicial, and the executive: these three are one, the State. It requires the combination and cooperation of these three coordinate branches to make the State Government; and when the word "State" is used in this article it is in this triune sense, and its constitutional provi-

> sion means that this trinity shall not deny, &c. Now, if the legislative branch enacts and the judicial and executive fail or refuse to perform their respective parts, does not the State "deny?" If the Legislature provides penalties, and the judiciary refuses to adjudge them or is unable to do so, has not the State denied to the citizen who is the victim of the violation of the legislative act the equal protection of the laws?

In his speech closing debate in the Senate, Senator Edmunds, manager of the bill, spoke at length on the point in question (*id.* at 696):

> There is a direct prohibition to the State; it is a direct prohibition against the making of a law; it is a direct prohibition against the enforcing of a law; and that perhaps brings me to the question here as well as anywhere else, what is a State?
>
> My honorable friend from Ohio [Mr. THURMAN] said yesterday, my friend from New Jersey [Mr. STOCKTON] said the other day, and everybody says on that side, that a State is the legislative department, and that all the prohibitions and commonds of this section [§ 1 of the Fourteenth Amendment] are addressed to the law-making power of a State, and that any omission of the Governor to give rights under his department, any omission of the judiciary to grant rights under their department, any violation by either of these departments of a State government of any right secured by this section, is not a violation by the State, for that must be by the law-making power. Now, apply it to this:
>
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."
>
> Not "abridge the privileges and immunities of citizens of one State going to another," as the old language was, but "which shall abridge the privileges

> and immunities of citizens of the United States," whether they are citizens of one State or another—absolute and complete. But what is the State? Is it the Legislature? It is as to making law, with the aid of a Governor. As to enforcing a law, is the Legislature the State? How do Legislatures enforce laws? I had been taught in my little reading and experience in the profession of the law that the enforcement of the law belonged to the judiciary and the executive combined. I had never heard before that it was a part of the legislative functions of a government to enforce laws; and yet, if my friend is right, although the very word "enforce" is used in this prohibition, it is after all only a command to the members of the Legislature that they shall not enforce any such law; and therefore the executive and the judicial departments of the State are not prohibited from enforcing any law they please which violates the privileges and immunities of citizens of the United States.
>
> Why, Mr. President, this is absurd; it flies in the face of the very language, it flies in the face of everything we know of the nature and constitution of a government, be it State or national.

A few minutes later, Senator Edmunds returned to the question and made these additional comments (*id.* at 697):

> "No State is to deny," say the gentlemen. That means, they say, the State in its collective capacity. What part of the State? My friend from Ohio says the Legislature. Then the Legislature, reading it in that way, shall not deny to any person within its jurisdiction the equal protection of the laws. It had said that before. The very second provision in this section declares that no State shall make or enforce any law which shall interfere with the privilege and immunity of a citizen of the United States; and everybody agrees that that privilege and that immunity is the very same thing that is mentioned in other lan-

guage in the next clause—the privilege of life, the privilege of liberty, the privilege of the acquirement of property. So that, on the theory of my friend from Ohio, a great constitutional amendment, carefully prepared, discussed in both branches of Congress, passed by two thirds of each House, ratified by three fourths of the States, committed the awkward blunder of stating over again, in obscure language, what it had stated in its second provision only four lines above in clear language: that it had said that no State (which can only act through its Legislature) shall make any law which shall do this thing, and when it had, then, coming to the last clause, had restated the same thing in vaguer language, that they should not deny to any person the equal protection of the law. That cannot be maintained. A Legislature acting directly does not afford to any person the protection of the law; it makes the law under which and through which, being executed by the functionaries appointed by the State for that purpose, citizens receive the protection of the law.

But they say this is merely a prohibitory section, a mere denial of the right of a State to interfere with life, liberty, and property, and to prevent due redress. What is a denial, Mr. President? Is it merely a refusal in the sense of a man's appealing to the Legislature for a law and being told that he cannot have it; or what is it? It is a security to the citizen that he shall have the protection of law. Although the word is negative in form, it is affirmative in its nature and character. It grants an absolute right, and let me tell my honorable friends who deny it that it is not a chance word; it has been heard of in the law before; it has a history connected with human liberty ever since in Anglo-Saxon races human liberty and human rights have existed. The very word has come down from the earliest constitutions, from the very earliest written constitution of civilized liberty, to us as a word of art which carries in it an

obligation of a supreme and universal affirmation—a character which makes it the duty of every court and every government over every people which are entitled to its protection to see that they have it.

Now let us see. Here is the ancient charter of liberty which the bold barons, as you know, our English ancestors, wrested from King John; the rich and perpetual product, like our own amendments, of a great struggle for liberty; and in it are contained, in order to grant to the citizen this very protection, and in order to secure to him the duty of all the courts of all England to give it, as they have done, these very words: *"Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam."*

"We will sell to no man, we will not deny or defer to any man either right or justice."

Under that, not by force of parliamentary legislation, but as giving ever-affirmative rights, performing an affirmative duty, the first slave that set his foot on English soil was set free, because the courts could not deny to him that justice which that charter said should not be denied. And under it, as I have said, in every civilized State, comprising all the States of our nation, and comprising that great commonwealth, or kingdom as I ought strictly to say, from which we derived our law and our history for eight hundred years, until now it is questioned for the first time, it has been the recognized and bounden duty of all courts, and of all executive officers intrusted with the administration of justice and the law, to give that which the citizen was entitled to, to execute justice and afford protection against all forms of wrong and oppression. Why, sir, it has blazed on the forehead of constitutional liberty from that day to this. And yet, now being adopted as the greatest security settled through the course of centuries as a protecting, as an affirmative right in the citizen—those interests of liberty and property and life to which he is en-

titled—now for the first time it is attempted to be frittered away by the statement that it is a mere negative declaration, a kind of admonitory prohibition to a State, and that Congress is to invade the rights of the States and the liberties of the people when, these rights being denied, when criminals go unpunished by the score, by the hundred, and by the thousand, when justice sits silent in her temple in the States, or is driven from it altogether, it interposes in their behalf; when the Government of the whole people, through their laws and tribunals, takes in its hand this ancient monument and guarantee of justice now found in its Constitution and applies it as it always has been applied. Why, sir, if I were in any other place I should say—

"O Shame, where is thy blush?"

3. ***The Fourteenth Amendment-enforcement function of § 1983 is inconsistent with sovereign-immunity defenses.***

Thus, while no one disputed that the Fourteenth Amendment placed restrictions on states *qua* states, or states in their legislative capacities, the controversy was over the Amendment's coverage of other forms of state action, particularly the administration and implementation of state laws. Congress' power to subject the states as such to suits in federal court was never put in doubt. It is this fact that makes it inconceivable that the same Congress, without saying so, meant to exempt the states in any of their manifestations from § 1983's coverage. Adding to this unlikelihood is the clear evidence that § 1983's primary function was to transfer jurisdiction over Fourteenth Amendment cases into the federal courts. The opponents of § 1983 argued that there was neither need nor propriety for additional legislation, because the Fourteenth Amendment could be enforced in the state courts, as could the Contract Clause of the original Constitution, for example, with the federal remedy being already provided in the form of § 25 of the Judiciary Act of 1789, 1 Stat. 85, authorizing review by this Court of state-court dispositions of federal constitutional questions.[35] While § 1983's sponsors did not deny this point,

[35] The remarks of Representative Storm, specifically objecting to § 1 of the Act (§ 1983), are exemplary (GLOBE app. 86):

> But I object to this clause because it subjects suitors to delay. It does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning.
>
> Now these questions could all be tried, I take it, in the State courts, and by a writ of error, as provided by the twenty-fifth section of the act of 1789, could be brought before the Supreme Court for review. That act, in its twenty-fifth section, provides that whenever the State courts draw in question any statute or authority of the United States, and the decision is against their validity, or where is drawn in question the validity of a statute or authority exercised under any State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision is in favor of their validity, the final judgment or decree of said court may be reexamined, reversed, or affirmed in the Supreme Court of the United States on a writ of error. But the first section of this bill does not allow that right. It takes the whole question away at once and forever; and I say that on the ground of delay it is objectionable. It subjects suitors who are seeking the enforcement of their rights to great additional expense. For, in many of these cases, the places of the sitting of the circuit courts and of the district courts are hundreds of miles from places where these cases might arise.

Almost 100 years later, in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), involving the validity, under § 2 (the Enforcement Clause) of the Fifteenth Amendment, of the Voting Rights Act of 1965, South Carolina argued to this Court a point similar to that pressed by Representative Storm in the quotation above. Relying on the fact that § 1 of the Fifteenth Amendment "has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice" (*id.* at 325), South Carolina argued that only "the judiciary [is authorized] to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob

as far as it went (*see, e.g.*, GLOBE 577-79 (dialogue of Senators Carpenter, Trumbull, Thurman and Edmunds)),[39] they were of the firm view, as we have seen (pp. 32-34, *supra*), that the lower levels of the federal judiciary needed to be brought into the service of the Fourteenth Amendment. That was § 1983's purpose. It is a purpose irreconcilable with the position of petitioners and *amici* that less than a full measure of relief is available when money belonging to the state is implicated in a § 1983 suit.

4. *The "Sherman amendment" debates are essentially irrelevant.*

To the extent that the lower courts have relied on the "person" holding of *Monroe* v. *Pape* to circumscribe the scope of relief available under § 1983 against states and state agencies (*see* note 37, *supra*), the courts are in error. The *Monroe* "person" holding—that municipalities, counties and parishes are not subject to suit pursuant to § 1983—is based exclusively on the defeat of the proposed Sherman amendment (and a revised version), which would have added a section to the 1871 Act making cities and the like absolutely liable (even if they were not at fault) for personal injuries and property damages resulting from riots within their borders. Whether the fate of the Sherman amendment is viewed as a product of "serious legislative concern as to Congress' constitutional power to impose liability on political subdivisions

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the courts of their rightful constitutional role." *Id.* The Court rejected the argument, holding that, "in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *Id.* at 326; *see also id.* at 327.

[39] The proponents agreed, for example, that the Contract Clause could be enforced against the States by the federal courts without any legislation from Congress other than a grant of jurisdiction—a point that had been settled since Chief Justice Marshall's opinion in *Sturges* v. *Crowninshield*, 4 Wheat. 122 (1819).

of the States" which also applies to § 1983, *Moor* v. *County of Alameda*, 411 U.S. 693, 708 (1973), or whether that fate is seen (as we view it) as a result of other concerns,[40] the Sherman amendment debates lend no support to the argument that state treasuries are protected from § 1983's reach. If the debates surrounding the Sherman proposal's defeat (coming after the Act, including § 1983, already had safely passed both the House and the Senate), are relevant in any way, it is because they demonstrate a contrary proposition.

The House Republicans responsible for the defeat of the Sherman amendment (*see* note 40, *supra*) uniformly expressed their opposition in terms peculiar to municipalities, but not to states. That is, their objections all were directed to the fact that municipalities have only such law-enforcement duties as the states choose to impose upon them. Nothing in the Fourteenth Amendment, in their view, authorized Congress to impose policing obligations upon cities, that being an exclusive prerogative of the States unaffected by the Amendment. Since there was no power to impose the policing duty, these Congressmen concluded that Congress necessarily lacked the power to subject municipalities to liability for the wrongs

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[40] In our view, the defeat of the Sherman amendment is not relevant to the scope of § 1983, which had already passed both Houses of Congress. But even assuming the relevance of the Sherman-amendment debates, we have pointed out (*see Monell Amici* Br. 17a-31a) that the defeat of that amendment is due entirely to the views of a handful of House Republicans who supported all of the provisions of the bill as it initially passed the House, but who "defected" with respect to the amendment added in the Senate at the behest of Senator Sherman. It is therefore the views of these defecting Republicans, rather than those of the House Democrats who opposed the bill in its entirety, which provide the correct understanding of the reasons for the defeat of the Sherman proposal. The *Monell amici* brief also shows that the failure of the Sherman proposal was not based on any doubts about Congress' power under the Fourteenth Amendment to subject municipalities to liability *for their own constitutional misconduct.*

of private citizens as proposed by the Sherman amendment. In other words, Congress could not impose a liability where it lacked the authority to impose a duty the breach of which was prerequisite to liability."[41]

This rationale is wholly incompatible with the notion that these same Congressmen doubted their authority to subject *states* to similar liability. It is problematic how they would have voted if someone had proposed to subject the *states* to liability without fault for riot damages. But surely they would not have questioned their power under the Fourteenth Amendment to impose both the duty and the liability upon the states as such. Representative Willard, one of the "defecting" Republicans (*see* note 40, *supra*), said as much (GLOBE 791):

> I hold that this duty of protection, if it rests anywhere, rests on the State, and that if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought home to the State. Hence, in my judgment, this section would be liable to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State.

There is no basis in the Sherman amendment debates or any other part of the 1871 Act's legislative history for imputing to Congress a desire to protect state treasuries from the consequences of federal § 1983/Fourteenth Amendment suits against state agencies and officials—suits which Congress manifestly intended to authorize.

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[41] *See* GLOBE 791 (Rep. Willard), 794 (Rep. Poland), 795 (Rep. Blair of Michigan), 795 (Rep. Burchard), 798 (Rep. Bingham), 798-99 (Rep. Farnsworth). *See generally Monell Amici* Br. 17a-31a.

5. *The § 1983 status of states and their subordinate units is, at the very least, an open question in this Court.*

Petitioners and *amici* urge that the following dictum in *Fitzpatrick* v. *Bitzer* decides the issue in their favor (427 U.S. at 452):

> We concluded that none of the statutes relied upon by plaintiffs in *Edelman* contained any authorization by Congress to join a State as defendant. The Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe* v. *Pape*, 365 U.S. 167, 187-191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant.

We submit that this language is not dispositive of the question, first, because it is *obiter dictum*, and second, because, to the extent that it relies on the "person" interpretation of *Monroe* v. *Pape*, it is erroneous, as we have shown above. We seek here only to demonstrate that the question is an open one in this Court. If it is, then it should be answered in accordance with the analysis set forth in the preceding part of this Argument.

Because of the *Fitzpatrick dictum* quoted above, the appropriate starting point is the 1974 decision in *Edelman* v. *Jordan*. (We have found no decision of this Court prior to that time which questions the § 1983 "person"-hood of states and state agencies.[42]) Despite the suggestion in *Fitzpatrick* that *Edelman's* § 1983 holding relied upon *Monroe* v. *Pape*, we are unable to understand *Edel-*

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[42] Section 1983 has formed the jurisdictional predicate for many of this Court's landmark Fourteenth Amendment rulings in federal-court suits against states, state instrumentalities, and state officials. *See, e.g., McLaurin* v. *Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971).

man (which does not even cite *Monroe*) in *Monroe* "person" terms. In Argument I, pp. 19-20, *supra*, we have quoted in full the *Edelman* § 1983 holding, which we interpret as being based on the fact that the Social Security Act—the source of the substantive rights involved there—did not authorize retroactive monetary relief against the states and, moreover, did not otherwise purport to override the sovereign immunity of the states.[42] A different result necessarily obtains when the § 1983 suit is one to enforce the Fourteenth Amendment, whose "substantive provisions . . . themselves embody significant limitations on state authority." *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 456.

We are further fortified in our interpretation of *Edelman* by the fact that the very next Term the Court decided the merits of a § 1983/Fourteenth Amendment case in which a state was a named party defendant, without questioning § 1983 subject-matter jurisdiction over the state. *Sosna* v. *Iowa*, 419 U.S. 393 (1975). *Sosna* cannot be viewed as a case in which jurisdiction was assumed without consideration. First, the Court specifically addressed the applicability of the Eleventh Amendment, cited *Edelman*, and concluded that the State of Iowa had validly waived the sovereign-immunity defense. *Id.* at 396 n.2. Second, the Court specifically examined the district court's subject-matter jurisdiction, concluding that "[s]ince jurisdiction was predicated on 28 U.S.C. § 1343(3), this case presents no problem of

[42] The *Fitzpatrick* explanation for *Edelman*'s handling of § 1983 is made more difficult to comprehend by reason of the Court's own treatment of the § 1983 "person" problem as a mandatory jurisdictional inquiry. *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). If the basis of the decision in *Edelman* truly was a determination that the suit against the official-capacity state official was in fact a suit against the state which "could not have been intended" by § 1983 to be a suable party, then the Court was without jurisdiction to render its decision on the Eleventh Amendment issue and should have vacated and remanded as in *City of Kenosha* v. *Bruno*, *supra*.

aggregation of claims in an attempt to satisfy the requisite amount in controversy of 28 U.S.C. § 1331(a)." *Id.* at 397 n.4. At the very least, *Sosna* must mean that the question of the suability of states under § 1983 is an open one.

6. *In any event, state officials are § 1983 "persons" for all purposes.*

In all events, the suability of state officials under § 1983 is firmly established. The status of such officials as § 1983 "persons" does not change when they are sued in their official capacities for monetary relief to be paid out of state funds: "the generic word 'person' in § 1983 was [not] intended to have a bifurcated application . . . depending on the nature of the relief sought. . . ." *City of Kenosha* v. *Bruno*, 412 U.S. 507, 513 (1973). There may be a basis for holding, as *Edelman* v. *Jordan* did, that suits against state officials to enforce federal statutory rights through § 1983 (*see* note 27, *supra*) do not overcome the Eleventh Amendment hurdle, unless the relevant federal substantive statute (in *Edelman*, the Social Security Act) portends that result. But there is no basis for allowing the Eleventh Amendment to be interposed as a barrier to complete relief in a § 1983 suit to enforce the Fourteenth Amendment, which of its own force limits the authority of the states. *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 453-56.

Accordingly, there is no sovereign exemption from monetary relief in a § 1983/Fourteenth Amendment suit against states, state agencies or state officials. Subsumed within that conclusion is the *a fortiori* proposition that awards of attorneys' fees in such suits are not barred.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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